No. 439

Supreme Court of the United States

OCTOBER TERM, 1958

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner*,

v.

AETNA FREIGHT LINES, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

HARRY L. SHNIDERMAN,
701 Union Trust Bldg.
Washington 5, D. C.

M. FLETCHER GORNALL, JR.,
WILLIAM W. KNOX,
Erie, Pennsylvania
Attorneys for Petitioner

COVINGTON & BURLING,
Of Counsel

March, 1959.

INDEX

CITATIONS

Cases:

Cases—Continued

Constitutional Provision and Statutes:

Constitutional Provision and Statutes—Continued

Miscellaneous:

Supreme Court of the United States

OCTOBER TERM, 1958

No. 439

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner,*

v.

AETNA FREIGHT LINES, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 207a-225a) is reported at 161 F. Supp. 875. The opinion of the Court of Appeals (R. 228) is reported at 257 F. 2d 445.

JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1958 (R. 233). A timely petition for rehearing was denied on August 14, 1958 (R. 234). The

petition for writ of certiorari was filed on October 13, 1958, and was granted on January 12, 1959 (R. 236). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 1 *et seq.*, provides, in the absence of an express election to the contrary, an exclusive administrative remedy for the death of an "employee" who is not "casual" and whose employment is "in the regular course of the business of the employer." As a matter of State court practice, the "employee" status is held to be a "question of law."

This is a federal diversity case brought by petitioner for wrongful death. Respondent, at the conclusion of the taking of testimony, made no request for the submittal of the issue of "employee" status for resolution by the jury; nor did it object to the court's failure to instruct on this issue. A jury verdict was returned for petitioner. The District Court thereafter denied motions to set aside the jury's verdict. The Court of Appeals, adhering to State practice as to the court's function, reversed, ruling that the Workmen's Compensation Act applied, and the suit for wrongful death must be dismissed. The Court held that petitioner's decedent was respondent's emergency "employee", and his employment was in the "regular course" of respondent's business. Thus there is presented the same basic question as in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525. That question is:

1. In a diversity case in a federal court, is the issue of whether petitioner's decedent was an employee, and whether his employment was in the regular course of respondent's business within the meaning of the Pennsylvania Workmen's Compensation Act, a question for jury determination?

The further question presented is:

2. Where respondent failed to request the trial court to submit the issue of petitioner's employee status under the Workmen's Compensation Act to the jury for determination on proper instructions, but instead obtained an erroneous reversal by the Court of Appeals which treated the issue as a matter of law, should the jury verdict in favor of petitioner be now reinstated, or is there some necessity for retrial?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is the Seventh Amendment to the United States Constitution. The statutes involved are Rule 51 of the Federal Rules of Civil Procedure, and Sections 104, 203, 302(b), and 427 of the Pennsylvania Workmen's Compensation Act (77 PURDON'S PA. STAT. ANN. §§ 22, 52, 462, 872). The texts of these provisions are set forth in the Appendix at pages i-iii.

STATEMENT

This case was brought by petitioner in the federal district court on the basis of diversity jurisdiction. Petitioner, as administrator of the estate, sued for the

wrongful death of Norman Ormsbee, Jr., a youth of twenty years, who died on March 20, 1956, survived by a widow and three small children (R. 86a). He died in a crash of a tractor-trailer operated by respondent. The truck was en route with 36,000 pounds of steel from Syracuse, New York, to Midland, Pennsylvania, a distance of 350 miles (R. 62a, 66a). The accident occurred near Rochester, Pennsylvania, when the truck failed to negotiate an S turn downhill (R. 12a). Petitioner's decedent, who had been riding in the truck for a short distance, and the driver, Schroyer, were both instantly killed. The tractor-trailer was leased, complete with driver, to respondent by the owner of the truck, one Fidler (R. 121a).

The jury returned a general verdict for $76,400, noting on the verdict slip, without direction by the court, that it found defendant "guilty of wanton conduct, in failing to maintain the braking equipment on the vehicle in proper working order on the night of March 20, 1956, which wanton conduct was the cause of the death of Norman Ormsbee, Jr." (R. 198a-199a). The jury also answered, in a fashion consistent with the general verdict, four special interrogatories prepared by the trial judge (R. 199a-200a), who prior to his advent to the bench had been an experienced Pennsylvania practitioner. Respondent's motions for a new trial and for judgment n.o.v. were denied by the trial court (R. 206a).

The Court of Appeals reversed the judgment below, holding that as a "question of law", which it could resolve, petitioner's status was that of an "employee" whose only remedy was under the Pennsylvania Workmen's Compensation Act. A timely petition for re-

hearing, principally addressed to a stay of proceedings, was denied.[1]

The evidence established that the respondent had operated defective leased equipment. In fact, as the trial judge noted in his opinion (R. 220a), neither respondent's evidence, nor any contention advanced by it, suggests that respondent made any routine inspection of Fidler's equipment before leasing it. Maintenance and repair of Fidler's truck was under the latter's control, although the equipment had been under lease to respondent for at least four years (R. 122a, 125a, 130a, 132a, 138a). Fidler himself did not perform such functions, but used an independent garage in a city near his home (R. 122a). Thus the ordinary repair of Fidler's equipment was certainly not in the hands of respondent.

Schroyer's trip from Syracuse which resulted in the double fatality was remarkably beset by a combination of unusual difficulties. Schroyer picked up his load on March 13, 1956, in Syracuse for a 350-mile journey which was expected to take 20 hours, including resting time (R. 66a). Because of the accumulation of unanticipated difficulties, Schroyer was still on his way seven days later when the accident occurred.

During the seven-day period that Schroyer was en route, he was constantly in touch with Fidler, who had

[1] In order to prevent the running of the Statute of Limitations, petitioner filed an administrative claim for workmen's compensation, which has remained dormant. Respondent denied responsibility and presumably is prepared to litigate once more the question of whether Ormsbee was an "employee" within the meaning of the Act. To prevent an unjust result, petitioner urged the Court of Appeals on rehearing to retain jurisdiction of this case by issuing a stay pending development of the Workmen's Compensation case —and particularly respondent's defense thereto.

hired him three weeks before and to whom he regularly looked for instructions (R. 122a-132a). For example, shortly after the trip commenced, Schroyer lost two tires in Batavia, New York. He communicated with Fidler, who proceeded from his base in Pennsylvania to Batavia with replacement equipment (R. 122a-123a). Fidler there instructed Schroyer not to proceed under certain anticipated weather conditions, and then departed. Again, when Schroyer later encountered battery trouble in Buffalo, he was in touch with Fidler, who specified the garage to be used for repair (R. 134a-135a). Moreover, it required specific authorization by Fidler for Schroyer to obtain an advance of funds from the Buffalo regional manager of respondent. The latter regarded Fidler as Schroyer's "boss" (R. 64a).

After advising respondent's Buffalo representative about brake trouble, and after a wholly superficial and inadequate test of the brakes was made, Schroyer proceeded to Waterford, just south of Erie, Pennsylvania, having completed slightly more than 230 miles of the journey (R. 62a-63a, 68a-69a). Schroyer stopped at Jones' Tavern just south of Waterford and there met Ormsbee and the latter's companion, Brown. Schroyer complained that he was having trouble with his equipment and offered to give Brown $25 to ride with him for the balance of the trip, because he was afraid that he might run into more trouble. Brown refused, but Ormsbee accepted when the proposition was then put to him (R. 35a, 38a, 39a-40a, 48a).

Ormsbee was not authorized to drive in Pennsylvania, since his license there had been revoked (R. 106a). Moreover, there is nothing in the record to indicate that Ormsbee under any circumstances was ex-

pected to drive the truck, and in fact the evidence is that he was not driving the truck when the accident occurred (R. 19a, 49a). Ormsbee had had extensive experience with cars and had worked as a mechanic, although what Ormsbee was expected to do in the event of "trouble" was not defined (R. 73a-74a, 87a).

The two men left the tavern, and were seen to proceed in a southerly direction, with Schroyer in the driver's seat (R. 49a). There is no further evidence of their whereabouts until the discovery of the wrecked vehicle some five hours later, with both men dead.

Respondent's chief purpose throughout the trial was to establish that Ormsbee was a trespasser, so as to eliminate liability unless petitioner established wanton negligence.[2] The evidence shows that the truck carried a "No Rider" sign. Moreover, both Fidler and respondent had instructed Schroyer that he was to carry no riders. Schroyer, in a written response to a question as to the circumstances under which he might have a rider, responded "No time." This answer, according to the testimony, was the only one acceptable to the respondent, and thus represented its company policy (R. 132a, 141a, 142a).

In pursuing its purpose to show that Ormsbee was a trespasser, respondent made no effort to establish that any of its trucks were ever manned with two drivers; nor to show that they ever were manned with a driver and a non-driving mechanical or other assistant; nor to show that at any time in the past it had ever permitted anyone to ride on one of its trucks for a business purpose. And certainly it made no effort to

---

[2] *Cf. Erie R. Co. v. Tompkins*, 304 U.S. 64, involving one aspect of this Pennsylvania rule.

show that any past emergency had ever necessitated an employee of respondent engaging either an emergency employee or an emergency agent on its behalf to ride on any of its equipment. The inference, rather, is clear that Ormsbee as a rider was performing a highly extraordinary and unexpected function.

At one stage of the trial, the judge informally commented to counsel that Ormsbee appeared to be a trespasser, but that the submission of special interrogatories might help clarify the jury's view on this and related questions (R. 119a). Later, the judge stated that his view on Ormsbee as a possible trespasser had been shaken by Fidler's testimony (R. 163a). Fidler, particularly in response to questions from the bench, had testified that he authorized garage repairs for his equipment, permitting Schroyer while on the road to "engage" a needed service (R. 132a).

At the conclusion of the taking of testimony, the court framed four pertinent special interrogatories (R. 160a). These were submitted for answers by the jury, to be returned along with a general verdict. Interrogatory No. 1 was to determine the jury's view as to whether Ormsbee was some sort of business licensee to whom respondent owed a duty of ordinary care. The interrogatory read:

> "Interrogatory Number 1. Under the evidence in this case, do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the decedent Norman Ormsbee, Jr. to accompany him for the remainder of the trip?" (R. 199a).

To this interrogatory the jury responded in the affirmative.[3]

In a colloquy with counsel, before submitting this interrogatory to the jury, the trial judge carefully noted that this interrogatory had been framed so as not to inquire whether Ormsbee was an employee of respondent, because that was a question of law for the court. The trial judge stated during this colloquy:

> "Number 1 I think is directed at one of the issues here. I have said, you see, you notice there I refrain from saying just what his status is. I don't think it is necessary to have the jury find whether he was employed or not; I think that is a question for the law. We might have to look at that afterwards, it depends on what you think of it." (R. 169a).

The respondent did not challenge this procedure of reserving the question for the court as to Ormsbee's status, and this is a matter of utmost significance.

Respondent submitted to the court certain requested instructions. Among these was its Request No. 7. This asked for a binding instruction to the jury that the Pennsylvania Workmen's Compensation Act provided

---

[3] The other interrogatories inquired whether respondent was negligent, to which the jury responded in the affirmative; whether the braking equipment was in proper working order, to which the answer was in the negative; and whether respondent was guilty of wanton conduct in failing to maintain the braking equipment in proper working order, to which the answer again was in the affirmative. The jury thus found the necessary wanton conduct to make it immaterial whether Ormsbee was a trespasser; but also by its answer to Interrogatory No. 1 found that Ormsbee was not a trespasser (R. 199a-200a).

the exclusive remedy if the jury found an emergency existed which justified Schroyer in hiring an assistant.[4] Respondent in due course excepted generally to the charge, and also excepted to the failure to give this binding instruction (R. 197a). However, although specifically invited by the court to ask that additional instructions be given the jury, respondent did not request the court to instruct the jury on the "employee" question, so as to permit the jury to decide the issue without a binding instruction (R. 195a-196a).

Since this is important, it should be stressed that respondent did not request that the jury be instructed to consider and determine whether Ormsbee was employed "in the regular course of the business of the employer." Respondent made no request that this statutory language of "regular course of the business", or any equivalent language, be presented to the hearing of the jury. Nor did respondent ask that the jury be instructed to determine whether Ormsbee was an employee as opposed to an agent, and if so, whether he was an employee of respondent.

---

[4] Respondent's Request No. 7 read as follows:

> "If you find that an emergency actually existed which justified the driver, Schroyer, in hiring an assistant to help him with the work that Schroyer was required to do for Aetna Freight Lines, Inc. and Schroyer did hire Ormsbee for this purpose, then your verdict must be for the Defendant in this case because the Pennsylvania Workmen's Compensation Act provides the exclusive remedy for injury or death in such a circumstance."

(This Request appears in the certified record before this Court at p. 2 of Appellant's [Respondent's] Answer to Appellee's Petition for Rehearing and Stay of Mandate.)

After the jury's verdict was returned, respondent moved for a new trial and for judgment n.o.v. Respondent contended that Ormsbee was a trespasser and that the record did not support either the special findings of an emergency situation, or of wanton negligence. Alternatively, respondent urged that Ormsbee was an "employee" within the meaning of the Workmen's Compensation Act, so as to bar the instant suit and provide an exclusive administrative remedy. Respondent conceded that Ormsbee's employment was "casual," within the meaning of the Act, but contended that the employment was "in the regular course of respondent's business."[5]

The trial court denied respondent's motion, and once again specifically called attention to the fact that:

> "Although at pretrial the status of decedent's relationship with defendant was raised and discussed, the interrogatory to the jury was not so phrased as to require the jury to determine whether decedent was an employee of Aetna." (R. 210a).

---

[5] Respondent also urged in its brief in support of its motions that Ormsbee was within the coverage of the Act because of a specific provision dealing with "employees of employees." One of the main point headings in respondent's brief was the following:

> "The Pennsylvania Workmen's Compensation Act expressly provides that its provisions shall apply to employees of employees; 77 P.S. § 462."

See also, § 203, 77 PURDON'S PA. STAT. ANN. § 52. The trial judge in his opinion specifically rejected this contention, pointing out that the law applied only to "employees of employees" operating on respondent's "premises." (R.211a).

The trial judge further stated that Special Interrogatory No. 1

> "was simply to secure a finding from the jury as to the reasonable necessity of Schroyer engaging decedent to accompany him on the remainder of the trip in protection of defendant's interests." (R. 211a).

The trial judge thus reiterated the view that he had expressed before submitting the interrogatory to the jury that the interrogatory was so framed as to reserve to the court the question of Ormsbee's status as an "employee" within the coverage of the Act.

The Court of Appeals reversed the judgment below. The Court held that Ormsbee's status was a "question of law" and "open to review." In so deciding, the Court relied principally upon SKINNER, a secondary treatise on the Pennsylvania Workmen's Compensation Act, which dealt with State court practice (R. 232).

The Court of Appeals, relying on Pennsylvania decisions, correctly defined "regular course of the business" as depending upon whether the employment was an "ordinary operation," or, stated somewhat differently, the "normal operations which regularly constitute the business" of the employer. The Court, however, surprisingly concluded that since Ormsbee was properly on the truck by virtue of the emergency, this

> "put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all." (R. 232).

SUMMARY OF ARGUMENT

I

1. *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, holds that, in a federal diversity case, the factual question of whether there is employment status under the Workmen's Compensation Act which would bar relief in a suit for wrongful death, is for the jury. Contrary state practice does not apply.

Here two fact issues were presented as to the employment status of petitioner's decedent: first, whether Ormsbee was respondent's employee, rather than the agent or employee of Fidler or Schroyer; second, on the assumption that Ormsbee was respondent's employee, whether he was employed in the "regular course" of respondent's business. Unless *both* questions are decided in favor of respondent, the Workmen's Compensation Act would have no effect on petitioner's right to recover in this proceeding.

The Court of Appeals, in erroneous reliance on state practice, disposed of both of these fact questions in favor of respondent. Respondent had made no effort to obtain a jury determination of these issues. It had sought a binding instruction which had been refused, and then was content to present to the jury only the question of whether Ormsbee was a trespasser.

The Court of Appeals, relying on a secondary treatise on state practice in workmen's compensation cases, resolved these questions as matters of law which it stated were open to review. This was patent error under *Byrd*.

2. On the facts in evidence, Ormsbee's employment status was for the jury.

In the first place, it would have been reasonable for the jury to have concluded that Ormsbee, while properly present on the truck, was not the employee of respondent. Fidler had maintained a continuing control over the equipment which he owned and over Schroyer whom he had hired to drive his truck. In particular, Fidler had maintained control of repairs and maintenance of his equipment, both on and off the road. The testimony supports the inference that the emergency that gave rise to Ormsbee's hiring was the prospective handling of broken-down equipment, a matter of direct concern to Fidler.

In the second place, it would have been reasonable for the jury to have concluded, on the assumption that Ormsbee was the employee of respondent, that he was not employed in the "regular course" of respondent's business. Under *Callihan* v. *Montgomery*, 272 Pa. 56, 115 Atl. 889 (1922), the words "regular course" serve to distinguish "normal" or "ordinary" business operations from "occasional" or "incidental" operations. Ormsbee's extraordinary hiring and brief employment hardly constituted a "normal" or "ordinary" operation of respondent. Rather it arose out of a combination of difficulties extending a 20-hour trip into a week-long journey. The facts and reasonable inferences are that respondent did not permit "riders," utilize roving mechanics for emergency repairs, nor employ riding assistants. Nor did respondent expect Ormsbee to drive the vehicle, and he in fact was not licensed to do so. Moreover, he was hired in such unusual circumstances that respondent was to insist throughout the trial that he was merely a trespasser. A jury could have found such an emergency employment of a casual tavern acquaintance not in "regular course," but simi-

lar to the emergency hiring of a passerby. *Vescio* v. *Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939).

II

Respondent refrained from seeking a jury determination of Ormsbee's employment status. It relied instead before the jury solely on the unsuccessful alternative contention that Ormsbee was a trespasser. It cannot now seek a new trial for presentation of additional issues to a jury.

There was a clear strategic advantage to be gained by respondent in so confining the case it presented to the jury. Respondent sought a decision only from the court on the question of whether the Workmen's Compensation Act barred recovery in the instant proceeding. For reasons of its own choosing, advantageous or otherwise, respondent made no effort to obtain instructions for a submission to the jury of the two questions as to Ormsbee's employment status. Even if respondent erroneously believed that the issues should be decided by the court alone, respondent nevertheless could have fully protected its position by seeking the required instructions.

Having failed to request a charge, or object specifically to any omission from the judge's charge, respondent cannot now seek to relitigate the case by obtaining a fresh opportunity to present the additional issues to a jury. The interests of sound judicial administration, as expressed in the Rules of Civil Procedure and the decisions of this Court, require this result. Rule 51, Federal Rules of Civil Procedure; *Louisville & Nashville R. R. Co.* v. *Parker*, 242 U.S. 13; *Palmer* v. *Hoffman*, 318 U.S. 109, 119; *United States* v. *Atkinson*, 297

U.S. 157, 159. This Court should, therefore, direct reinstatement of the jury verdict in favor of petitioner.

ARGUMENT

I

THE COURT OF APPEALS IN RELIANCE ON STATE PRACTICE ERRONEOUSLY ASSUMED FUNCTIONS RESERVED TO THE JURY UNDER FEDERAL PRACTICE.

A. *THE COURT BELOW, IN ERRONEOUS RELIANCE ON STATE PRACTICE, DECIDED ORMSBEE'S EMPLOYMENT STATUS AS A QUESTION OF LAW.*

In *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, this Court held that, in a federal diversity case, the factual question of whether there is employment status under the Workmen's Compensation Act which would bar relief in a suit for wrongful death, is for the jury. This Court decided that *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, does not require that the federal court follow state practice when it is contrary to the federal rule favoring jury trial.

Indeed any other rule would raise a serious constitutional question under the Seventh Amendment. This constitutional question would likewise appear if, in diversity cases, the scope of the review of jury verdicts by federal appellate tribunals were enlarged in reliance on state practice. *Lumberman's Mutual Casualty Co.* v. *Elbert*, 348 U.S. 48, 53, fn. 5.

The function of the jury in a federal court proceeding needs little exposition. This Court has made it clear that it lies within the province of the fact-finding body—whether it be a jury or an administrative board—to apply the relevant statutory standard to the

facts of the case.[6] In doing so, the fact-finder considers the applicability to the facts of statutory standards, such as those delineating the circumstances under which coverage is provided, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 ("course of employment"), *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469 ("course of employment"); those defining the persons who are covered, *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370 ("member of a crew"); and those prescribing the equipment required for safety, *Myers* v *Reading Co.*, 331 U.S. 477 ("efficient hand brakes"). In the process, the finder of fact weighs and resolves conflicts in the testimony, *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U.S. 29; and determines what inferences it will draw from the basic facts, *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469, 477. Moreover, the decision of what inferences to draw is for the fact-finder even where the facts are not in dispute. *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350, 353; *Boehm* v. *Commissioner of Internal Revenue*, 326 U.S. 287, 293; *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469, 478. And where a jury is applying a statutory standard, the party who hopes to benefit from the resolution of the issue has the right to request from the court a proper instruction explaining that standard.

As is developed in the Statement, quite contrary to federal practice as to the jury's proper function, Ormsbee's employment status was treated below as a question of law for the court to resolve. The Court of Appeals reached its decision in reliance on Pennsylvania practice as to the function to be performed by the court.

---

[6] *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370, 372, fn. 2.

The factual issues of employment status around which this case turns at this stage are two-fold. The first is whether Ormsbee must be regarded as having been respondent's employee in spite of his relationship to Fidler and Schroyer under the unusual circumstances of his hiring. On the assumption that respondent was the employer, the second factual issue is whether this unusual employment was in the "regular course of the business" of respondent. Only such employment is covered by Section 104 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 22.

Respondent, in the trial court, did not request that the jury be instructed to determine on the facts whether Ormsbee was an employee of the respondent within the meaning of the Workmen's Compensation Act, and more particularly did not request an instruction on Ormsbee's status as an employee in the "regular course of the business" of the respondent. The trial judge, in keeping with his view of Pennsylvania practice, was content to treat the issue as a matter of law. The Court of Appeals likewise held that the issue was a "question of law" for it to decide under Pennsylvania practice, although reaching the opposite conclusion as to the applicability of the Act.

The Court of Appeals specifically stated that it was deciding the question as one of law in reliance on SKINNER, a secondary treatise on the Pennsylvania Workmen's Compensation Act.[7] The Court quoted SKINNER as holding the issue to be "a question of law, and open to review." (R. 232). The parallel to *Byrd*

[7] SKINNER, PENNSYLVANIA WORKMEN'S COMPENSATION LAW (4th ed. 1947).

is manifest, because SKINNER, in defining Pennsylvania practice, was primarily concerned with the circumstances under which a court might "review" the decision of the Workmen's Compensation Board, the administrative tribunal which decides compensation cases. The applicable statutory section, § 427, 77 PURDON'S PA. STAT. ANN. § 872, provides for an appeal to the courts from any action of the Board "on matters of the law." Consequently, while factual questions are for the administrative tribunal, questions of law may be reviewed by the court.[8]

Thus the underlying reason for the Pennsylvania practice declaring employment status to be a matter of law for the court is to permit judicial review of the decisions of the administrative board. *Callihan* v. *Montgomery,* 272 Pa. 56, 115 Atl. 889 (1922); *Blake* v. *Wilson,* 268 Pa. 469, 112 Atl. 126 (1920); *Passarelli* v. *Monacelli,* 121 Pa. Super. 32, 183 Atl. 65 (1936); *Boyd* v. *Philmont Country Club,* 129 Pa. Super. 135, 195 Atl. 156 (1937); *Barnett* v. *Bowser,* 176 Pa. Super. 17, 106 A.2d 457 (1954).

The Pennsylvania practice which the Court of Appeals was endeavoring to follow was largely derived from state practice in review of administrative compensation decisions. It cannot be gainsaid, however,

---

[8] The Court of Appeals, as further support for SKINNER, footnoted a reference to *Ciccocioppo* v. *Rocco,* 172 Pa. Super. 315, 94 A.2d 77 (1953), a Workmen's Compensation Board case. The state court there concluded that the drawing of inferences from basic facts of record as to the "regular course" of the employer's business is for the court as an issue of law. This should be contrasted with the role ordinarily assigned the fact-finding board in the drawing of inferences from basic facts. *Cf. Cardillo* v. *Liberty Mutual Co.,* 330 U.S. 469, 477.

that this practice is commonly carried over to tort cases brought in the state courts. When issues of employment status arise, which possibly would defeat the action and require the plaintiff to look solely to workmen's compensation for relief, the courts hold that the question is a matter of law for the court. *Vescio* v. *Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939); *Persing* v. *Citizens' Traction Co.*, 294 Pa. 230, 144 Atl. 97 (1928). That is how the state practice was applied in the court below.

The facility with which fact issues as to statutory coverage are translated into questions of law can be seen in *Butrin* v. *Manion Steel Barrel Co.*, 361 Pa. 166, 63 A.2d 345 (1949). There, in a trespass action, a somewhat different issue was presented as to whether an accident occurred while the plaintiff was engaged in the course of his employment. The state court sharply divided 4 to 3, drawing opposite inferences from the same facts, but all proceeding on the basis that the inferences were for the court as a matter of law, with no need to submit the issue to the fact-finder.

While the Pennsylvania practice of withholding from the jury the decision as to the applicability of the Workmen's Compensation Act is common, we do not believe that we can be belabored with a charge of challenging the interpretation of the court below of state practice by stressing that this Pennsylvania practice is not basic to any statutory scheme. It cannot be deemed to be an integral and fundamental part of the Pennsylvania statutory plan, so as to have some special claim for respect under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.[9] It is not bound up with state statutory

[9] See *Walters* v. *Kaufmann Department Stores, Inc.*, 334 Pa. 233, 5 A.2d 559 (1939). In this common law action, the question of

rights and obligations. Thus it would not do violence to the Pennsylvania statute for this Court to follow its "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. at 538. In any event, the *Byrd* case has made it clear that trial by jury of the question of coverage of workmen's compensation laws is not so clearly productive of a different substantive result as to suggest the state rule should prevail under *Erie R. Co.* v. *Tompkins, supra.*[10]

It will thus be seen that in the instant case federal practice controls as to the allocation of function between judge and jury, and as to the scope of appellate review. It was improper for the court below to rely on state practice. And as we shall now see, under federal practice Ormsbee's employment status was within the province of the fact-finder; therefore, respondent, in seeking to defeat the cause of action, should have had the issues submitted for determination by the jury.

B. *THE ISSUES CONCERNING ORMSBEE'S EMPLOYMENT STATUS WERE FOR THE JURY.*

This case presented a real question of employment status. If respondent wanted to defeat recovery for its tortious conduct on the basis of the applicability of the Workmen's Compensation Act, it should have asked the jury, and not the court, to decide the matter. The

---

employment status was presented, though not the question of "regular course of the business." The issue was treated as a question for determination by the jury.

[10] The Constitutional guarantee of jury trial would likewise suggest the same result, though this issue was not reached in the *Byrd* case. 356 U.S. at 537, fn. 10. See *Herron* v. *Southern Pacific Co.*, 283 U.S. 91.

record provides a sufficient basis from which the jury, if it believed the testimony, could infer that Ormsbee was not *respondent's* employee; or, in any event, in the unusual situation prevailing, he clearly was not engaged in the "regular course" of respondent's business.

1. The relationship among the truck driver Schroyer, the lessor Fidler, and the respondent was complex. *Cf. Gearhart* v. *Summit Fast Freight, Inc.*, 167 Pa. Super. 481, 75 A.2d 606 (1950); *D'Alessandro* v. *Barfield*, 348 Pa. 328, 35 A.2d 412 (1944); *Kimble* v. *Mackintosh Hemphill Co.*, 359 Pa. 461, 59 A.2d 68 (1948). The question of who, if anyone, was Ormsbee's employer when he was engaged by Schroyer during his stop at the tavern was for the jury.

Surprisingly, the Court of Appeals did not consider whether Ormsbee could have been the employee of someone other than respondent. The court below was deciding Ormsbee's status as a matter of law, and was not evaluating what a jury could reasonably have found. Nevertheless, should the court have merely assumed that Ormsbee was engaged by the truck driver Schroyer *for respondent?*

While Schroyer may or may not have been an employee of respondent in his role as driver of the leased equipment, certainly as to certain functions he maintained a general employment relationship with the lessor Fidler. This relationship was clearly understood by the Buffalo regional manager of respondent who not only referred to Fidler as Schroyer's "boss," but also declined to advance funds to Schroyer without Fidler's prior consent. Moreover, as has been pointed out in the Statement, Fidler constantly directed Schroyer's movements during the seven-day period that the latter was en route from Syracuse, particularly with respect to the care and repair of the truck.

It was Fidler's testimony that persuaded the trial judge that Ormsbee might reasonably be found to be something other than a trespasser. And Fidler's testimony was that he arranged for garage repairs of his equipment, and authorized Schroyer to engage any needed service on the road.

The nature of the emergency must be understood to consider the nature of any contemplated duties, and for whom they were to be performed. The emergency had not arisen in the instant case because of any health condition of the driver, with the possible need for a substitute.[11] It is, therefore, clear that Ormsbee was not engaged to drive the leased equipment. In fact, he was not licensed to drive in Pennsylvania at all. Here Fidler had authorized necessary repairs and services, and the jury had specially found an emergency had arisen which justified engaging Ormsbee. The nature of the emergency was such that Ormsbee in this setting could reasonably have been considered as engaged on behalf of Fidler to help handle a broken-down truck.

It of course would not have been necessary for a jury to find that Ormsbee was respondent's employee in order to conclude that Ormsbee was not a trespasser as to respondent. So long as Ormsbee's presence on the truck served respondent's interests, Ormsbee was a business visitor and not a trespasser under Pennsyl-

---

[11] See Illustrative Example 5 to § 79, RESTATEMENT, AGENCY 2d, which reads:

"5. P employs A as a truck driver to carry a valuable load of perishable fruit to a distant town. En route, A becomes ill and unable to drive. Being unable to communicate with P, he employs B, a competent driver, to take his place for the trip. It may be found that A was authorized to employ B as P's servant."

vania law. *Kimble* v. *Mackintosh Hemphill Co.*, 359 Pa. 461, 59 A.2d 68 (1948). See also, RESTATEMENT, TORTS § 332; RESTATEMENT, AGENCY 2d § 242, Com. *b*.

Obviously the repairman who serviced the battery in Buffalo at Fidler's direction would not have been a trespasser as to respondent. His presence on the truck would have been for a business purpose, irrespective of whether he was an independent contractor or an employee. Similarly, Ormsbee, when properly present on the truck because of an emergency, could have been considered by a jury as an authorized business visitor as to respondent, but as an agent acting for Fidler or for Schroyer.

Consequently, the existence of an emergency situation that justified Schroyer in engaging Ormsbee does not resolve the question as to whose employee Ormsbee became upon being engaged. That issue of employment status is one that respondent should have put to the jury if it wished to bar recovery.

2. On the assumption that Ormsbee was respondent's employee, there still remains the issue of employment in the "regular course of the business." A jury, if presented with the issue of employment in the "regular course of the business," could well have concluded that the extraordinary, but brief, mission of Ormsbee as a non-driving, but traveling mechanic or emergency helper, did not qualify him for workmen's compensation coverage. This becomes clear upon considering the Pennsylvania courts' long-established construction of the statutory provision, § 104, 77 PURDON'S PA. STAT. ANN. § 22, which excludes "persons whose employment is casual in character and not in the regular course of the business of the employer."

The leading case in defining "regular course" is

Callihan v. *Montgomery*, 272 Pa. 56, 115 Atl. 889 (1922), in which the court stated:

> "The legislature evidently intended, by the use of the words 'regular course,' to give them some definite significance and the most natural meaning is that they refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business. . . ." (272 Pa. at 72, 115 Atl. at 895).

See also, *Blake* v. *Wilson*, 268 Pa. 469, 112 Atl. 126 (1920); *Ciccocioppo* v. *Rocco*, 172 Pa. Super. 315, 94 A.2d 77 (1953). This test of "normal operations," quoted by the Court of Appeals in its opinion (R. 232), does not require resort to any rigid formula for its application. It is a question of what inferences should be drawn from the facts.

The decision of the Court of Appeals, premised as it was on the erroneous conclusion that the question was one for it to decide, shows that it failed to face up to the question of the "normalcy" of the operation in which Ormsbee was engaged. The Court simply stated that "the hiring of Ormsbee put him into the regular business of defendant, namely, *transportation of goods by truck.*" (R. 232). (Emphasis supplied.) If anything is clear, it is that Ormsbee had nothing to do with the transportation of goods by truck. He did not drive; he was not licensed to drive; and he was not expected to drive. If a breakdown had occurred, presumably Ormsbee would have helped in a mechanical or related capacity in meeting the "trouble" which led to his engagement in the first place. His services were not the "transportation of goods by truck," but the pro-

spective handling of broken-down equipment owned by the lessor, Fidler.

Of course it is possible for a company which is engaged in the "transportation of goods by truck" to perform other connected functions. These functions, if ordinarily performed by the company itself, may be in the "regular course of the business" of the company, even though not involving transportation of goods by truck. *Cf. Callihan* v. *Montgomery,* 272 Pa. 56, 115 Atl. 889 (1922), distinguishing emergency repair of machinery from ordinary maintenance operation.[12] However, the Court of Appeals was content to classify Ormsbee as an employee in "regular course" by simply stating that he was engaged in the transportation of goods.

In the instant case, it appears that even the ordinary repair functions performed on equipment leased from Fidler and others was handled for respondent by independent contracting garagemen, rather than as a routine supplementary function of the respondent's business. Thus respondent did not do even this kind of work *regularly.* Be that as it may, the testimony shows how far removed from "ordinary" or "normal" was the transportation of Ormsbee in the emergency. Ormsbee's role arose out of an emergency due to a week-long ordeal in covering the distance of a day's journey. Ormsbee was engaged by an underling who was under

---

[12] The repair work must usually be done by the company for itself, and not contracted out. As the court said in *Callihan, supra:* ". . . but such work if not of a kind usually performed by or under the control of the person conducting the business, would be outside the regular course thereof." (272 Pa. at 72, 115 Atl. at 895). See also, *Miller* v. *Farmers Nat. Bank,* 152 Pa. Super. 405, 33 A.2d 646 (1943).

strict orders that he was to have "no riders" with him at any time. The respondent and Fidler did not normally operate trucks with employees whose functions were those which Ormsbee was to provide. Respondent itself was to insist throughout the trial that, in relation to its operation, Ormsbee's role was so far from normal or routine that he was a trespasser. Only the extraordinary course of events justified the emergency engagement of Ormsbee to perform unusual functions in respondent's interests. The inference is that in respondent's normal operation, it neither provided roving mechanics, riding assistants, nor $25-a-trip short-haul companions.

If presented with the question, the jury might well have concluded that Ormsbee was not engaged in the transportation of goods, and was not otherwise engaged in what would be considered a "normal operation" of respondent. The jury could have adhered to its view that the very abnormality of the operation and situation at hand meant that Ormsbee was not a trespasser on the truck, but had a business purpose to perform. At the same time the jury could have found that Ormsbee's role in respondent's affairs was not that of an employee in the "regular course" of the latter's business.

The question of employment by respondent, rather than by Fidler or Schroyer, and the question of whether this employment was in the "regular course" of respondent's business, involve a weighing of the facts and the inferences from the facts. While Pennsylvania precedents in other factual situations do not provide significant guidance, a few cases should be examined. The Court of Appeals relied heavily on *Persing* v. *Citizens' Traction Co.*, 294 Pa. 230, 144 Atl. 97 (1928). There the hauling away of a stalled trolley was held to

be in the regular course of business of the trolley company. The hiring of a tractor and driver to perform the job was far from extraordinary, because the same tractor and driver had been hired only thirty days before for the same purpose. Further, as the record shows, the Superintendent of Transportation of the trolley company did the hiring.

The Pennsylvania Supreme Court has held more recently, in *Vescio* v. *Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939), that the emergency employment of a passerby to help remove another employee of an electric power company, when he had become entangled in the power lines, was not in the "regular course" of the defendant's business. Therefore, a suit for damages would lie when the passerby, who had become an emergency employee, was injured by the carelessness of another employee of the defendant. The function of providing electric power could not go forward until the man was removed, because pending his being extricated the power lines had to be shut off. But the court thought that the service rendered was not "regular" because rendered "under an abnormal, unexpected and accidental circumstance." 336 Pa. at 507, 9 A.2d at 549.

In view of *Vescio*, a jury determination that Ormsbee was not engaged in the "regular course" of respondent's business would have been reasonable. *Heckman* v. *Warren*, 124 Colo. 497, 238 P.2d 854 (1951), points to the same conclusion. This recent decision by the Colorado Supreme Court was reached under a statute construed identically to the Pennsylvania courts' construction of the "regular course" provision. In the *Heckman* case a truck en route on the highway caught fire. A gasoline station attendant, whose assistance was sought, boarded the truck to help put out the fire. While

the court held the attendant an emergency employee of the trucker, the employment was not in the "normal operations constituting the regular business of the employer." 124 Colo. at 509, 238 P.2d at 860.

In summary, the two fact questions as to Ormsbee's status properly belonged with the jury. There was a reasonable basis for the jury to decide either or both in favor of petitioner, in which case respondent could not succeed in its present assertion that the Workmen's Compensation Act bars recovery.

II

SINCE RESPONDENT REFRAINED FROM SEEKING A JURY DETERMINATION OF ORMSBEE'S EMPLOYMENT STATUS, BUT INSTEAD RELIED ON UNSUCCESSFUL ALTERNATIVE CONTENTIONS BEFORE THE JURY, RESPONDENT CANNOT NOW SEEK A NEW TRIAL FOR PRESENTATION OF ADDITIONAL ISSUES TO A JURY.

The second question presented by the Petition for Certiorari is whether there is any necessity for a retrial in this proceeding. We submit that this Court's judgment should make it clear that no such retrial is necessary. In fact, reinstatement of the jury verdict is proper on this record.

As has been demonstrated in Part I, *supra*, the issues of Ormsbee's employment status were properly for the jury. Respondent could have sought such a jury determination in a federal court proceeding, but refrained from doing so. Respondent could have asked that these issues be presented to the jury, and, in the event of an adverse verdict, still have been free to request the trial court for judgment n.o.v. Instead, respondent elected to present a single theory of its defense to the jury. Respondent decided, insofar as the jury was concerned,

to have it listen solely to the argument that Ormsbee was nothing but an unauthorized trespasser who was entitled to protection only against wanton misconduct. In all likelihood, respondent preferred that the jury have the case in this simple posture, with the court alone deciding the questions of the applicability of the Workmen's Compensation Act.

It can hardly be denied that respondent derived strategic advantage from its firm stand before the jury that Ormsbee was nothing but an intruder—an unwanted trespasser. There was no vacillation in this position; there were no "if's, and's, and but's." There was no tacit recognition, for the sake of an alternative argument before the jury, that perhaps Ormsbee was authorized to be on the truck; and, if he was authorized the jury should remember that respondent then claimed that Ormsbee was its employee, not anyone else's—and, what is more, its employee in such a normal and ordinary manner as to be in "regular course." Could respondent have presented this alternative argument without weakening its basic position that Ormsbee was so divorced from its normal business operation as to be a trespasser? Obviously not.

It is clear, therefore, that, whatever the reason for its decision to reserve the workmen's compensation issues for the court, respondent achieved a strategic advantage. This advantage would have been dissipated if respondent had attempted to persuade the trial judge, after its Request No. 7 for a binding instruction had been refused, that the court should instruct the jury to consider and decide the workmen's compensation questions.

In spite of the advantage of an undiluted and concentrated defense before the jury based on the single

theory that petitioner's decedent was a trespasser, the jury returned its verdict for petitioner. Now the question is whether respondent's alternative theory with respect to the Workmen's Compensation Act should be given a belated airing before a new jury, which also would be importuned to adopt respondent's original trespasser theory.

The procedural course that was open to respondent is made clear by Rule 51 of the Federal Rules of Civil Procedure. The Rule provides for the filing of written requests for instructions to the jury. The Rule further provides:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

While respondent entered a general objection to the charge by the judge, and an objection to the failure of the court to instruct on those of its special requests which had been rejected (R. 197a), respondent neither requested the court, nor objected to its failure, to charge the jury as to the circumstances under which the Workmen's Compensation Act would apply so as to defeat the cause of action. Respondent was content to ask for a binding instruction in its Request No. 7. This Request did not even advise the jury that only those employees engaged in the regular course of respondent's business were covered by workmen's compensation. The Request rather was specifically tailored to withdraw from the jury not only the question of "regular course of the business," but also the question of whose employee Ormsbee was intended to be.

Failing to obtain the binding instruction which it requested, respondent did not care to have the issues submitted to the jury. When the trial court asked counsel if there was anything further which they desired to have added to the charge, respondent's counsel requested additional instruction in connection with contributory negligence, and after these were given, he specifically stated that there was nothing further on which he desired to have the jury charged (R. 195a-196a).

Respondent's Brief in Opposition, at p. 16, advances the surprising contention that if petitioner feels that additional instructions were needed, petitioner should have asked for them. This, of course, confuses the whole point. Petitioner is not objecting to the instructions given, and petitioner is not objecting to the jury verdict in its favor. It is respondent who is objecting to the jury verdict. It is respondent who is relying on the Workmen's Compensation Act in order to defeat petitioner's cause of action. If, as we believe, the issues of Ormsbee's employment status were for the jury, and, if respondent wants to upset the jury verdict, it would have to show that the court's instructions failed in some material respect in spite of respondent's requests for charges. In short, it is respondent who is insisting that petitioner's cause of action should be dismissed because the remedy under the Workmen's Compensation Act is exclusive. Patently, since petitioner was not urging the dismissal of his own cause of action, there was no necessity for petitioner to see to it that the jury was instructed as to the circumstances under which his cause of action might fail. *Palmer* v. *Hoffman*, 318 U.S. 109.

The record does not show all the factors that may

have entered into respondent's decision not to ask for instructions to the jury on the "employee" issues under the Act. Perhaps respondent did not object to the omission in the charge because it assumed, along with the trial court, that under Pennsylvania practice the issues were solely for the court, even though the court be federal. If this were the reason, respondent could have protected its position by nevertheless requesting the instructions. If the instructions had been granted, and the verdict were for petitioner, respondent could thereafter have urged the court that it should nevertheless decide under Pennsylvania practice that the Compensation Act barred recovery. On the other hand, if the instructions had been refused, and the verdict were for petitioner, respondent again would have been fully protected. Upon any subsequent holding on appeal that in a federal court the questions were for the jury, respondent, in view of its request for instructions, would then have been entitled to a new trial.

However, respondent's strategy was to center the jury's entire attention on the trespasser issue, which was its principal line of defense. As we have noted, it would have weakened respondent's position to have had the jury instructed that Ormsbee might be an unusual type of employee who was not even covered by workmen's compensation. Such an instruction might have made Ormsbee look less like a trespasser in the eyes of the jury. Respondent, therefore, not only in fact derived an advantage from its single theory presentation, but normally could be expected to understand that it was obtaining an advantage in not having its secondary position—that the Workmen's Compensation Act controlled—submitted to the jury, except upon a binding instruction.

It is, of course, not material why respondent decided to forego its privilege of requesting jury instructions. It does not matter whether it mistook the law, or took a calculated strategic risk. It has long been settled that parties who fail to request charges, for whatever reasons may appeal to them, cannot later impose upon the court and the other party the burden of retrial.

Thus this Court has held, in an opinion by Mr. Justice Holmes, that where a binding instruction was requested, which was properly denied, and which was not followed by a request for submittal of the issue to the jury on proper instructions, no claim of error can be made because of the failure of the court to instruct the jury. *Louisville & Nashville R.R. Co.* v. *Parker*, 242 U.S. 13. The *Louisville* case involved a damage action which would lie only if plaintiff's employment was in intrastate commerce. The defendant asked for a directed verdict that the plaintiff was engaged in interstate commerce, and this request was denied. Defendant did not ask for the opportunity to have the issue submitted to the jury, possibly because the judge assumed throughout that intrastate commerce alone was involved. As Mr. Justice Holmes stated, at p. 15:

> "It is true that the Judge seems to have assumed that the business in hand was intrastate, but the only objection indicated was to his not ruling the contrary and as the Railroad did not ask to go to the jury and the only ruling requested was properly denied the judgment must stand."

In fairness to the trial court and the other party, an erroneous charge on the law, or an omission from the charge, must be specifically called to the trial court's

attention. If this is not done, the complaining party cannot later contest the jury verdict. *Palmer* v. *Hoffman,* 318 U.S. 109, 119; *Pennsylvania R.R. Co.* v. *Minds,* 250 U.S. 368, 375. Where there is no request for a charge, nor objection to the charge as given, the verdict should stand in the interest of ending litigation. *United States* v. *Atkinson,* 297 U.S. 157, 159; *Humes* v. *United States,* 170 U.S. 210; *Texas & Pacific Railway* v. *Volk,* 151 U.S. 73, 78. And where a party has additional theories to sustain his position, but requests no instruction with respect to them, Rule 51 precludes re-examination. *Cafasso* v. *Pennsylvania R. Co.,* 169 F.2d 451 (3d Cir. 1948).

Palmer v. *Hoffman, supra,* is particularly pertinent. There, in a diversity case, two causes of action for negligence were based on a Massachusetts statute, and two on the common law. The trial court, without distinguishing between them, charged that the burden of proving contributory negligence was on defendant (petitioner). This was a correct interpretation with respect to the statutory causes of action, but apparently incorrect as to the common law counts, where the burden of proving freedom from contributory negligence would have been on the plaintiff (respondent). The defendant below, like the trial court, had not fully comprehended the distinction, but simply requested a flat instruction that the burden was on plaintiff as to all four causes of action. The request was refused. This Court, on certiorari to the Second Circuit, ruled that even a partially correct request for a charge was not sufficient to obtain a new trial. "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." (318 U.S. at 119).

United States v. *Atkinson, supra,* shows the same approach. The trial judge's charge to the jury as to the meaning of "total disability" under a government insurance policy was not objected to by petitioner, the United States. At the trial stage, petitioner did not challenge the validity of its own Veterans' Administration regulation upon which the charge to the jury was based. The case proceeded on the possibly erroneous theory that the statement of law by the court was correct, and it was only on appeal that petitioner attacked the jury verdict and asserted the need for a new trial to permit a proper instruction. The Supreme Court ruled that "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end" dictated sustaining the jury verdict (297 U.S. at 159).

It is respectfully pointed out that the problem as to the nature of the mandate that should issue here is different from that in the *Byrd* case. In the *Byrd* case, petitioner, before completing his case, induced the trial court to strike respondent's defense based on the Workmen's Compensation Act. The trial court gave respondent an exception to the striking of its defense. Thus petitioner effectively prevented any submittal of the issue to the jury.[13] With the record on the issue incomplete, and the respondent's defense stricken, there was no issue on which the jury could have been instructed. In the instant case this procedural situation did not prevail. All of the testimony was taken.

---

[13] As this Court stated in its opinion in *Byrd:* "His [petitioner's] motion to dismiss the affirmative defense, properly viewed, was analogous to a defendant's motion for involuntary dismissal of an action after the plaintiff has completed the presentation of his evidence." 356 U.S. at 532.

The trial court made no determination on its own of the issues pertaining to workmen's compensation prior to the submittal of the case to the jury. Respondent thus was at all times free to seek a jury decision on these issues, as well as on any of the other issues upon which it wished to rely in persuading the jury to find for it.

In short, if this Court holds in the instant case that under the *Byrd* precedent the employment status of Ormsbee was for the jury to decide, then the jury verdict must stand, since respondent cannot demand another chance before another jury to request appropriate instructions. Respondent should not gain a fresh opportunity before another jury to retry all the issues in this case, simply because it failed to ask for a jury charge. Such a *seriatim* approach would be burdensome to the litigants and a mockery of that sound judicial administration which is reflected in Rule 51 and the cases cited.

We submit that, in addition to holding that no new trial is needed, this Court should also direct reinstatement of the jury verdict. All issues presently pertinent to this case were resolved by the court below, except the contention that the jury verdict was excessive.[14]

---

[14] The respondent, in its appeal brief to the court below, raised five points.

The first, third, and fourth points, respectively, maintained (I) that there was no "emergency" to take plaintiff out of the trespasser class; (III) that there was no competent evidence to sustain a finding of wanton misconduct as against a trespasser; and (IV) that there was no competent proof that any act of wanton negligence was the proximate cause of Ormsbee's death. The Court of Appeals, responsive to the first point, held that there was a reasonable basis for the jury's finding of an "emergency." Consequently, the third

This last point is wholly without merit, was dealt with fully by the trial court in its opinion, and can be disposed of by this Court's order without the necessity of further proceedings below.[15] Consequently, a reversal with directions to reinstate the jury verdict is both the expeditious and proper disposition of this matter.

---

and fourth points were not considered because they became academic —Ormsbee was not a trespasser.

The second point (II) raised by respondent was that Ormsbee's exclusive remedy, if he was an emergency employee, was under the Workmen's Compensation Act. The Court of Appeals decided this point in favor of respondent.

The fifth point (V) was that the verdict was grossly excessive. This point is the only one which is not academic and which was not reached below.

[15] The contention that the verdict was grossly excessive is frivolous. The trial court dealt fully with the point in its opinion (R. 221a-223a). As was stated by the Third Circuit Court of Appeals, in *Scott* v. *Baltimore & O.R. Co.*, 151 F.2d 61, 65 (3d Cir. 1945):

> "Judicial control of the jury's verdict in this kind of case is primarily for the trial court. Dubrock v. Interstate Motor Freight System, 3 Cir., 1944, 143 F.2d 304. A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case."

The Third Circuit recently noted, in *Lebeck* v. *William A. Jarvis, Inc.*, 250 F.2d 285, 288 (3d Cir. 1957), that its authority is "very limited" and

> "The sum of the matter is that we could not lawfully disturb this verdict if we would, and we would not, if we could."

The victim in the instant case was twenty years of age, with a long life expectancy. The Third Circuit recently sustained a verdict of

CONCLUSION

For the foregoing reasons the petitioner prays that the judgment below be reversed and the jury verdict reinstated.

Respectfully submitted,

HARRY L. SHNIDERMAN,
701 Union Trust Bldg.
Washington 5, D.C.

M. FLETCHER GORNALL, JR.,
WILLIAM W. KNOX,
Erie, Pennsylvania
Attorneys for Petitioner

COVINGTON & BURLING,
Of Counsel

MARCH, 1959

$80,000 for the death of a forty-seven year old hoist operator. *Thomas* v. *Conemaugh & Black Lick R.R. Co.*, 234 F.2d 429, 434 (3d Cir. 1956). And a verdict of $93,655 was not deemed excessive by that court for the death of a twenty-seven year old driver of a bread truck whose previous year's earnings were $3,000. *Wilson* v. *Nu-Car Carriers, Inc.*, 158 F.Supp. 127, 135 (M.D. Pa. 1958), *aff'd*, 256 F.2d 332 (3d Cir. 1958).